IN THE

Supreme Court of Virginia

RECORD NO. 160500

LAWRENCE E. GELBER AND DARLENE A. FLEISCHMANN, Co-Executors of the Estate of Beverly E. Gelber, Deceased and Co-Trustees of The Beverly E. Gelber Trust, Dated Dec. 1, 2010, as restated and amended,

Appellants,

v.

MERYL ANN GLOCK,

Appellee.

REPLY BRIEF OF APPELLANTS

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For their Reply Brief, Appellants Darlene Fleischmann and Lawrence Gelber, Trustees and Executors ("Executors"), state the following.

I. MRS. GLOCK MISAPPLIES THE STANDARD OF REVIEW.

Even though this Court must view the evidence in the light most favorable to the Executors, Mrs. Glock incorrectly recites facts in the light most favorable to her. Executors correctly apply the standard of review. Mrs. Glock's erroneous recital includes, but is not limited to, the following:

Glock's Incorrect Recital	Executors' Correct Recital
Mrs. Glock contends she was "meek" and "non-meddlesome."[1]	Mrs. Glock controlled Mrs. Gelber, blocking family members from financial and medical information Mrs. Gelber wanted to share. [2]
Relies on Accountant's testimony that Mrs. Gelber wished to favor Mrs. Glock.[3]	Accountant never discussed the disputed property with Mrs. Gelber and conceded that Mrs. Gelber could have made changes to estate planning when she was not frail. [4]
Mrs. Gelber was "alert and oriented" on July 18. [5]	Numerous contradictory medical records and Dr. O'Neill's testimony refute this.[6]

[1] (Br. of Appellee at 5.)
[2] (J.A. 628–32, 655, 819–20, 930–37, 950–53, 1163–67, 1175–79, 1322–34, 1408–10.)
[3] (Br. of Appellee at 5.)
[4] (J.A. 806, 1073–76, 1141–43.)
[5] (Br. of Appellee at 6.)

Glock's Incorrect Recital	Executors' Correct Recital
Mrs. Glock "did not participate in the [July 18, 2014] transaction at all."[7]	Mrs. Glock paid for the legal services, attempted to hire a different lawyer, delivered legal papers, arranged the notary, and obtained her ill and hospitalized mother's signature without legal advice for mother.[8]
Executors and Dr. O'Neill conceded that Mrs. Gelber "lacked capacity"[9] at time of signing.	Executors gave no legal opinion about testamentary capacity; they opined she was weak, lacking "mental cognition to sign a complex document at that time of day."[10]
Mrs. Fleischmann and her daughters stole things from the Edwardsville Home without permission.[11]	Mrs. Fleischmann and her daughters acted at Mrs. Gelber's request to secure the property in question.[12]

[6] (J.A. 709–11, 713–15, 732–34; *see generally* 709–36, 778–88, 863.)
[7] (Br. of Appellee at 7.)
[8] (J.A. 1091–92, 1113–14, 1119–21, 1124–25, 1525–32.)
[9] (Br. of Appellee at 11–12.)
[10] (J.A. 781.)
[11] (Br. of Appellee at 13.)
[12] (J.A. 640-44, 901.)

Glock's Incorrect Recital	Executors' Correct Recital
Mrs. Gelber lacked capacity to amend her trust and will after her discharge from St. Mary's Hospital.[13]	Disinterested witnesses confirmed Mrs. Gelber's lucidity and alertness at the moment of these testamentary signings.[14]

II. THE EVIDENCE PROVED THE DOCUMENT SIGNINGS OCCURRED LATE IN THE AFTERNOON.

Mrs. Glock testified that the conveyance documents were signed in the "late afternoon" of July 18, 2014, consistent with the Executors' summary chronology of events that was entered into evidence without objection.[15] Mrs. Glock argues, for the first time on appeal, that the factum occurred not in the late afternoon but as early as 1:52 p.m.[16] This conflicts with her account that she learned at the factum her mother could not be discharged, which medical records confirm was determined at 4:28 p.m.[17]

Most importantly, undisputed phone records reveal that **after** Mrs. Glock summoned the notary the Landas **never** telephoned Mrs. Glock.[18] Mrs. Glock now urges that she "engaged" in phone calls with the Landas

[13] (Br. of Appellee at 14–16.)
[14] (J.A. 986–1016)
[15] (*Compare* J.A. 1114, *with* J.A. 1118–19, 1510.)
[16] (Br. of Appellee at 19.)
[17] (*Compare* J.A. 1118–19, *with* J.A. 1457.)
[18] (J.A. 1121, 1510.)

after calling the notary, but Mrs. Glock made those calls **to** the Landas, not—as Mrs. Glock swore under oath—the other way around.[19] Thus, her claim **that the Landas coincidentally called** before the document signing was a lie, whether the phone records read in UTC Time or Eastern Time.

In response, Mrs. Glock suggests the phone records do not prove who initiated a telephone call.[20] But, for this proposition, she quotes only part of the phone records key, which explicitly defines "originating number" as the number that originates a phone call; only for *data transmissions*, such as internet communications, is the "originating number" potentially inaccurate.[21] Further, the phone record summary, admitted without objection by Mrs. Glock, recites that Mrs. Glock called the notary public at 5:13 p.m.[22] Mrs. Glock disregards the summary because she believes it is inaccurate or irrelevant[23] even though she failed to object to this evidence and waived any objection. The summary is in evidence as is.

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[19] (J.A. 1510.)
[20] (Br. of Appellee at 19 n.13.)
[21] The phone record explanatory legend for "Originating Number" reads, in its entirety, as follows: "The phone number the call/text originated from. For data records, this does not necessarily mean the number originated the data transaction. The network constantly communicates with internet enabled devices and the data records do not indicate if a customer initiated a data transaction." (J.A. 1775.)
[22] (J.A. 1189, 1388, 1173–74.)
[23] (Br. of Appellee at 17–20.)

For the first time, Mrs. Glock urges that she may have misstated both the timing of the factum and whether she or the Landas originated the "coincidental" call.[24] But the Record lacks evidence that Mrs. Glock believed she was mistaken on those subjects. Notwithstanding this, she asks this Court to accept that her testimony was mistaken and to bind the Executors to her newly imagined, unstated narrative. She cites no authority for this inference, which is contrary to the standard of review and unsupported by the Record.

It is true the phone records contain indications that the call times are reported in UTC Time (i.e., four hours before Eastern Time). However, the records remain unclear because they were "queried" by Eastern Time Zone.[25] Also, the "connection time" column states that the times are in "(UTC)," yet the "date" column for phone calls does not state that it reflects the UTC date. If the phone records exclusively show UTC time, then they would report not only the hour of the day, but the date in UTC time because calls between midnight and 3:59 a.m. Eastern Time occurred the previous day in UTC Time. Given the contemporaneous medical records and Mrs.

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[24] (*Compare* Br. of Appellee at 17–20, *with* J.A. 1114–21, 1510.)
[25] (J.A. 1511.)

Glock's sworn testimony that the factum occurred in the late afternoon, the evidence proved that the signing occurred late in the afternoon.[26]

That Mrs. Glock now so hotly contests how evidence should be weighed does not support that the trial court should have struck this case. It illustrates the opposite conclusion: the jury—not the trial court—was entitled and obliged to weigh the evidence and draw inferences from it. The motion to strike standard of review requires the evidence to be viewed in the light most favorable to the Executors.

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[26] Assuming *arguendo* the phone records reflect calls made four hours earlier than indicated in the summary, the records show that Mrs. Glock called the law firm at 5:02 p.m. (J.A. 1510.) Had Mrs. Glock objected to the summary at trial, then the Executors would have introduced additional evidence that the document signings occurred late in the afternoon because Mrs. Glock, immediately after the signings, called the lawyer's office to ensure the firm would stay open to receive them. Deprived of Mrs. Glock's objection, the Executors relied on her agreement admitting the phone summary as relevant evidence. Mrs. Glock now objects late to the relevance of the phone summary, withdrawing her agreement to its admissibility and inclusion in the Record, while enjoying the benefit of the Executors' reliance on this agreement. That is the definition of approbation and reprobation. *See Leech v. Beasley*, 203 Va. 955, 961–62 128 S.E.2d 293 (1962) ("A litigant is estopped from taking a position which is inconsistent with one previously assumed …. [o]r, … 'A [party] shall not be allowed to approbate and reprobate at the same time.'"); *see also Title Guarantee Trust & Sav. v. Clifton Forge Nat'l Bank*, 149 Va. 168, 175, 140 S.E. 272, 274 (1927) ("After . . . lulling the [plaintiff] into security by conduct of this sort, the [defendant] cannot now be permitted to change front to the injury of [plaintiff].").

III. AUTHORITIES AND ARGUMENT

a. Assignment of Error No. 1: The Evidence Made Out a Claim of Mrs. Glock's Undue Influence.

Mrs. Glock first urges that Mrs. Gelber could not have been unduly influenced because she lacked capacity to execute the documents. First, the evidence did not prove that Mrs. Gelber lacked legal capacity, but that she was cognitively and physically frail.[27] Second, a grantor's weakness of mind, in part, gives rise to a **presumption** of undue influence. Mrs. Glock cites no authority for the proposition that the overwhelming evidence of Mrs. Gelber's weakened state failed to support the presumption of undue influence in this case.

Mrs. Glock assumes her testimony rebutted any presumption of undue influence. But, viewed in the light most favorable to the Executors, Mrs. Glock's own testimony revealed her to be controlling of Mrs. Gelber and deceitful. The Executors identified at least nine separate ways Mrs. Glock's testimony was impeached.[28] Save one, Mrs. Glock ignored all of

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[27] (J.A 704, 781, 1173–75, 1190.)

[28] (Opening Br. of Appellant at 22–23 (impeached regarding Mrs. Gelber's cognition, false promises to her, that others stole from her; false claims of Mrs. Glock's uninvolvement in the conveyances, regarding her theft of $7,500, and her manipulation and controlling nature; and false claims of the Landas' telephonic witnessing of the conveyances).)

these. Her response to that basis for impeachment, related to the phone records summary, depends on a misapplication of the standard of review.[29]

Indeed, by ignoring that Mrs. Glock was impeached, and insisting the Executors were bound by Mrs. Glock's testimony, Mrs. Glock misapprehends the required standard of review throughout her Response: the evidence must be viewed in the light most favorable to the Executors including all reasonable inferences fairly deducible therefrom.

The jury alone was the fact finder and arbiter of credibility in this case. It was entitled to infer from the repeated impeachment of Mrs. Glock that she was not credible and to discount her testimony unless corroborated to the jury's satisfaction. Mrs. Glock does not dispute this standard. She cites to *Thornton v. Glazer*, 271 Va. 568, 572, 628 S.E.2d 327, 330 (2006), to argue that the Executors are bound by her self-serving testimony. But *Thornton* says the opposite:

> Rule 4:7 clearly establishes that a party seeking to introduce deposition testimony of an adverse party will not suffer the consequences of making the deponent his own witness. This is the conclusion we reached in *Horne v.* [*Milgrim*], 226 Va. at 138, 306 S.E.2d at 895, where the Court held that "Horne was entitled to rely on [the adverse party's] deposition without incurring the dangers inherent in making her his witness."

[29] (Br. of Appellee at 23–24.)

Id. By calling Mrs. Glock, the Executors did not "mak[e] her [their] own witness" nor did they "incur[] the dangers inherent in making her [so.]" *Id.*

b. Assignment of Error No. 2: Mrs. Glock Ignores the Plain Meaning of the Dead Man's Statute.

Mrs. Glock states: "To accept the Plaintiffs' argument, this Court would have to conclude that it simply forgot about or ignored the Dead Man's Statute (which had been in effect for 23 years) in deciding *Savage*." This defies logic. The *Savage* opinion says what it says and says not a whit about the Dead Man's Statute. Mrs. Glock ignores the more likely explanation that perhaps the *Core* and *Savage* parties never raised the Dead Man's Statute as an alternative hearsay exception or that these cases focus instead on the hearsay exception allowing a declarant's state of mind regarding testamentary documents, now found at Rule 2:803(3). Without precedent, Mrs. Glock asks this Court to infer a judicially-created exception to a law passed by the General Assembly because a prior opinion of the Court never cited, much less discussed, that act. Mrs. Glock asks this Court to ignore the plain terms of the Dead Man's Statute, which exists to remove all barriers to the admission of a decedent's statements at trial, effectively gutting it in undue influence cases.

Nor did Mrs. Glock address the *Wallen* court's silence on the Dead Man's Statute or recognize that evidence of Mrs. Gelber's weakness of

mind should be admitted under *Jackson v. Hewlett*, 114 Va. 573 (1913). Nor does she acknowledge or address the trial court's inconsistent rulings regarding Mrs. Gelber's statements admitted to support Mrs. Glock but refused to support the Executors.[30]

c. Assignment of Error No. 3: The Executors Proved Fraud in the Inducement.

Mrs. Glock's response to this issue again relies on erroneously viewing the evidence in the light most favorable to her. Mrs. Glock argues that if Mrs. Gelber lacked capacity at the factum she could not have been tricked into giving away her property. But contrary evidence, viewed in the light most favorable to Executors, came from Mrs. Gelber herself:

> I did not intend to sign the deed that conveyed my home on Edwardsville Drive to my daughter, Meryl Glock. When she asked me to sign the deed, I was in a weakened mental, physical, and emotional state. I believe she took advantage of my condition to take my home. Meryl led me to believe that I did not need any more chemotherapy for my cancer. She said that I could then move into an addition that she was going to build at her home. I now know that my cancer is not in remission. It will never be possible for me to move into Meryl's home. . . . I am very angry and upset with my daughter, Meryl, who I believe has manipulated me and betrayed my trust.[31]

It is true that Executors and Dr. O'Neill spoke of Mrs. Gelber's weakened mental state, but their opinions about capacity were either lay or medical

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[30] (Opening Brief at 24 n.117–18.)
[31] (J.A. 1335.)

opinion, not legal opinion. That Mrs. Glock accomplished her fraud by exploiting her mother's weakness does not defeat a fraud claim, and Mrs. Glock cites no authority for that counter-intuitive suggestion. Further, Mrs. Glock's testimony denying promises she made to Mrs. Gelber is evidence that Mrs. Glock never intended to honor those promises. Mrs. Glock also contends that *Chappell v. Trent*, 90 Va. 849 (1893), makes fraud and testamentary incapacity mutually exclusive. Again, Executors have not alleged testamentary incapacity because they do not dispute a will; rather the evidence proved Mrs. Gelber's frailty and vulnerability when the documents were signed. Finally, Mrs. Glock did not dispute the Executors' argument that they sought rescission and therefore were not required to prove monetary damages.

d. Assignment of Error No. 4: Mrs. Glock Ignores Evidence Supporting the Executors' Conspiracy Claims.

Mrs. Glock fails to address the argument that business damages are not required for a statutory conspiracy claim based on Va. Code § 18.2-499(A) (ii), which prohibits the willful or malicious compulsion of another "to do or perform any act against his will" without regard for harm to one's business. *See* Va. Code § 18.2-499(A). By failing to speak to this argument, it appears Mrs. Glock has conceded it.

Instead, Mrs. Glock's argument focuses on a narrative of her role that omits facts and inferences favoring the conspiracy claims. Mrs. Glock broadly asserts she played no role in the disputed transfers even though she (i) paid for the drafting attorney's legal services, (ii) facilitated the document signing, (iii) arranged the notary, (iv) procured her mother's hospital bedside signature, and (v) attempted to hire Attorney Foreman despite being familiar with Mrs. Gelber's estate attorney.

e. Assignment of Error No. 5: Mrs. Glock Raises New Objections About the Personal Property to No Avail.

For the first time on appeal, Mrs. Glock responds with a judicial estoppel argument regarding the Tangible Personal Property Deed ("TPP Deed"). Yet the authority relied upon by Mrs. Glock states that the doctrine is "not reducible to any general formulation of principle" and requires a more careful review of the circumstances than Mrs. Glock provides. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). The doctrine prevents parties from taking clearly inconsistent positions that mislead the tribunal and establish an unfair advantage for the fair-weather party. *Id.* Here, however, there was no inconsistency, the court was never misled, and the Executors gained no advantage from a purported bait-and-switch.

On August 28, 2014, the trial court held an emergency hearing on Mrs. Gelber's pretrial attachment motion, within 10 days after initiating the

suit, before the original Complaint was served on Mrs. Glock, and before any discovery issued. At that hearing, Mrs. Gelber—alive at the time—contended that her personal property was stolen requiring a status quo injunction to prevent being defrauded as a "creditor." *See* Va. Code § 8.01-534. The trial court refrained from ruling whether Mrs. Gelber was a creditor and ordered that the personal property remain in the Edwardsville Home except those items Mrs. Gelber wanted in her final days.[32] It was no secret that the meaning and import of the Bill of Sale required further litigation to determine if Mrs. Gelber owned the Personal Property.[33]

Notably, any assertion by Mrs. Gelber that she owned the Personal Property was not incorrect in August 2014. Under the TPP Deed, she owned the property as Trustee of her living trust (the "Trust") while she was alive.[34] Neither the trial court nor Mrs. Glock were misled by this position, which the Executors later crystallized through amendments to the original Complaint pleading the existence of the TPP Deed—which amendments Mrs. Glock never opposed.[35] All concerned had fair notice that Executors disputed title and possession under the Bill of Sale. Mrs. Gelber's pre-

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[32] (Aug. 28, 2016 Tr. 28:3-14.)
[33] (*Id.* 20:20–23, 23:3–7.)
[34] (J.A. 1303–10, 1315, 1336–38.) Counsel did not nominate her "trustee" at that time because counsel did not know that until later in the litigation.
[35] (J.A. 98–99; Order, dated April 28, 2015.)

discovery, pre-summary judgment position created no risk of the trial court making inconsistent legal rulings. Indeed, at the hearing on the motion for partial summary judgment, Mrs. Glock argued the merits of the TPP Deed regarding the Bill of Sale, thereby waiving objections of judicial estoppel or waiver, never suggesting the emergency filing misled her or the trial court or gave the Executors an unfair advantage.

f. Assignment of Error No. 6: Mrs. Glock Failed to Respond to the Executors' Argument Regarding the Tax Record.

The Executors argue that the tax record of the value of the Edwardsville Home should have been admitted pursuant to Rule 2:803(8). Mrs. Glock did not cite, much less discuss, this rule of evidence. That silence should be construed as a concession. Mrs. Glock instead argued that the tax record is inadmissible pursuant to Va. Code §8.01-390.[36] Yet Rule 2:803(8) admits records containing information to which the information source could testify "*[i]n addition"* to other categories of public records admissible by statute. Thus, Rule 2:803(8) is not limited by Va. Code § 8.01-390; instead the rule is a separate, additional basis for admitting government documents. The rule contains other limitations but no prohibition against opinion testimony.

[36] (Br. of Appellee 42–44 (citing no cases that address Rule 2:803(8)).)

g. Assignment of Error No. 7: Mrs. Glock Did Not Respond to the Gravamen of the Executors' Position on Fees.

The Executors argue that Mrs. Glock's right to attorney's fees only arises out of the Bill of Sale for the Personal Property, assuming *arguendo* she ultimately prevails on that issue. Mrs. Glock does not dispute that her claim is limited to fees related to the Personal Property. But she never explains why her fees, which relate to **both** the Personal Property and the Real Property, are recoverable even though her right thereto is limited to the Personal Property. By not explaining the reasonableness of $370,000 in fees for a mere $30,000 in Personal Property, she concedes those fees were unreasonable. She refuses to apportion her fees between the Real and Personal Property without explanation. And she does not dispute that this case concerned property 91% of which was **not** Personal Property.

This Court, in *Ulloa v. QSP, Inc.*, 271 Va. 72 (2006), made clear that attorney fees are recoverable only as for claims for which there is a right to recover fees. Here, if Mrs. Glock had any such right, it was limited to reasonable fees specific to the Personal Property, not to all the property.

IV. CONCLUSION

For these reasons, and those previously stated, the judgment of the trial court should be reversed and the matter remanded for a new trial.

Dated: December 1, 2016 By: *Cullen D. Seltzer*
Counsel

V. CERTIFICATE OF SERVICE

Pursuant to Rule 5:26, I hereby certify the following:

a. Appellants/Plaintiffs and Counterclaim Defendants are Lawrence E. Gelber and Darlene A. Fleischmann, Co-Executors of The Estate of Beverly E. Gelber, Deceased, and Co-Trustees of The Beverly E. Gelber Trust u/a Dated December 1, 2010, as restated and amended. Appellants are represented by:

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b. Appellee/Defendant and Counterclaim Plaintiff is Meryl Ann Glock. Appellee is represented by:

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c. Counsel for Appellants certifies that on the 1st day of December, 2016, one electronic (.PDF) copy and one paper copy of the Reply Brief were correspondingly e-mailed and mailed by first-class mail, postage prepaid, to all counsel. Counsel for Appellants further certifies that ten (10) printed copies of the Reply Brief were also filed in the office of the Clerk of the Supreme Court of Virginia.

d. Appellants desire to state orally the reasons why the judgment below should be reversed and remanded.

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